

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

76-1008

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P/S

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellant.

-against-

FRANK ALTESE, a/k/a FRANKIE FEETS, et. al.,

Appellee.

*Appeal From The United States District Court
For The Eastern District Of New York*

**BRIEF FOR APPELLEE
SALVATORE ANNARUMO**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 76-1008

UNITED STATES OF AMERICA,
Appellant

v.

FRANK ALIESE, a/k/a Frankie Feets,
et al.,

Appellee

-----X

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE,
SALVATORE ANNARUMO.

PRELIMINARY STATEMENT

This is an appeal pursuant to 18 U.S.C. 3731, from an order of the United States District Court for the Eastern District of New York (Mishler, C.J.) entered on November 26, 1975, which dismissed prior to trial four counts of an eight-count indictment (App. 6-16) alleging gambling and racketeering offenses in violation of the Organized Crime Control Act of 1970, 84 Stat. 922 (hereinafter "the Act"). The district court's order is being appealed only as to the dismissal of counts one and two, charging violations of 18 U.S.C. 1962(c)

and (d), 84 Stat. 942-43.

STATUTES INVOLVED

18 U.S.C. 1962 provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of any unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect,

interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. 1961 provides in pertinent part:

(1) "Racketeering activity" means
(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year;
(B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315

(relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

* * * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of

the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

* * * *

ISSUES PRESENTED

Whether or not Section 1962(c) of Title 18 applies to the activity charged in the present indictment.

STATEMENT OF FACTS

The facts are set forth in the Government's Brief.

ARGUMENT

POINT I

SECTION 1962(c) OF TITLE 18 DOES NOT APPLY TO THE ACTIVITY CHARGED IN THE PRESENT INDICTMENT

Counts 1 and 2 of the indictment, which were dismissed by the District Court, alleged purported violations of Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. Section 1962. The plain intent of Congress and the language of the statute proscribe the infiltration of legitimate businesses by organized crime figures.

The present indictment is devoid of any allegation that the defendants were involved in any activity other than that of illegal gambling. Indeed, the Government has specifically charged that their crime encompassed illegal gambling activities which were violative of Section 225.10 of the New York State Penal Law.

It is assumed that other briefs submitted by the Appellees will explore the legislative history of the section in question in depth. We feel, however, that illustrative examples of Congress' intent may be found in the following:

Title IX "has as its purpose the elimination of infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."
Senate Report 617, 81st Cong., 1st Sess.,
at Page 76 (1969).

"Section 1962 establishes a three-fold prohibition aimed at stopping the infiltration of racketeers into legitimate organizations." 2 U.S. Code
Cong. and Admin. News (1970), at Page 4033.

Once again, it is assumed that the case law on point will receive full treatment in the briefs of other Appellees. Nevertheless, it is the position of Appellee, Salvatore Annarumo, that United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), upon which the Government places heavy

emphasis, was erroneously decided. Further, the Government's reliance upon United States v. Parness, 503 F.2d 403 (2nd Cir. 1974), is misplaced. The Parness case, supra, merely passes upon the issue of infiltration of foreign as well as domestic legitimate enterprises. 503 F.2d at 439. The better reasoned view was expressed in United States v. Amato, 367 F.Supp 547 (S.D.N.Y. 1973) which held that Section 1962 "makes it unlawful to invest the proceeds of racketeering in legitimate business, and Section 1962 (d) makes it unlawful for any person to conspire to violate any provision of Section 1962." 367 F.Supp. at 549.

The point which Appellee, Annarumo, wishes to add, however, is a simple one, stressing the plain-meaning application of the statutory language. It would appear that a substitution of definitional terms reveals the Government's position to be somewhat ludicrous.

Adopting the Government's position that the term "any enterprise," as used in Section 1962(c), includes a "gambling enterprise," and employing the proper definitions of "racketeering activity" (as provided by Section 1961[1]) and "unlawful debt" (as provided by Section 1961[6]), we find that the section in question (1962[c]) must be read as follows: (keeping in mind that the charges are based only upon the defendants' illegal gambling activities):

"It shall be unlawful for any person employed by or associated with a gambling enterprise engaged in or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of acts involving gambling or collection of a debt incurred or contracted in gambling activity." (emphasis supplied)

It is respectfully submitted that such an interpretation of the present criminal statute is not legally warranted.

CONCLUSION

The order of the District Court dismissing Counts 1 and 2 of the indictment should be affirmed.

Dated: New York, New York,
March 25, 1976.

Respectfully submitted,

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BRILL, MAURICE "USA v. Altese

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

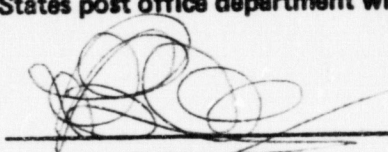
ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 26 day of March 1976 deponent served the within Brief upon:

U.s. Atty. East. Dist. of NY

attorney(s) for
Appellant

in this action, at
225 Cadman Plaza East, Bklyn, NY

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


Robert Bailey

Sworn to before me, this 26
day of March, 1976.


WILLIAM BAILEY

Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, 1977